United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1233

To be argued by
MICHAEL YOUNG

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

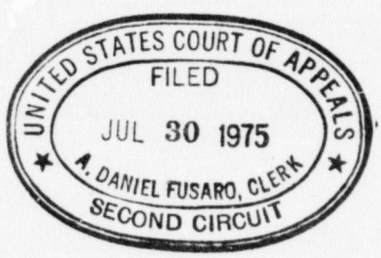
DAVID HERNDON,

Appellant.

Docket No. 75-1233

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the material errors in the presentence report and the improper grounds upon which the district judge imposed sentence require a remand for re-sentencing.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) entered on June 6, 1975, after a plea of guilty, convicting appellant David Herndon of one count of entering a bank with intent to commit a larceny, in violation of 18 U.S.C. §2113(a), and sentencing him to five years' imprisonment.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Herndon was originally indicted on one count of attempted bank robbery with the use of force, violence and intimidation, in violation of 18 U.S.C. §2113(a) (74 Cr. 697).

Trial commenced on January 21, 1975. A guard from the Greater New York Savings Bank at 55 Flatbush Avenue, Brooklyn, testified that appellant Herndon entered that bank on October 28, 1974. According to the guard, Herndon, after obtaining a glass of water from the guard because he was feeling ill, drew a gun on the guard and said he would shoot the guard

unless the guard gave him all the money. When the guard responded that he must be joking, Herndon ran out of the bank. He was pursued by the guard and eventually arrested, at which time a toy gun was found in his coat pocket.

Herndon testified in his own defense, explaining that although he entered the bank with intent to rob it, once inside he changed his mind and fled. He denied ever having taken the toy gun out of his pocket or threatening the guard.

The trial ended in a mistrial because the jury was unable to agree on a verdict.

Thereafter the Government obtained a superseding indictment (75 Cr. 192) which, in addition to charging appellant with attempted bank robbery by force or violence (Count One), also charged him with entering a bank with intent to rob it (Count Two).

On March 24, 1975, Herndon pleaded guilty to the charge in Count Two -- entering a bank with intent to rob it. In response to a question by the court, Herndon said that he adhered to his trial testimony (Transcript of March 24, 1975, at 5).

At the beginning of the sentencing proceeding on June 6, 1975, trial counsel informed the court that the presentence report was inaccurate and incomplete (4*). Before hearing what these errors were, the judge responded that he knew the

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*Numerals in parentheses refer to pages of the transcript of the sentencing proceeding June 6, 1975.

defendant pretty well, and that counsel was "making an accusation [as to the presentence report] that has no basis" (4).

In the presence of Mr. Sachs, the probation officer who prepared the report, counsel pointed out that the report claimed that appellant acknowledged committing an attempted robbery (5). Counsel explained that in his testimony at trial and in his guilty plea Herndon had admitted only that he entered the bank with intent to rob it, a less serious crime. In response, Probation Officer Sachs told the court that Herndon had admitted an attempted robbery to him. Herndon denied this (6-7).

The district judge acknowledged that Herndon had admitted to "intent and nothing else" in his trial testimony (8). However, the judge stated that Herndon's trial testimony had been "very calculated" (8), and repeatedly insisted that he was guilty of the more serious crime of attempted robbery with use of intimidation, and that he had lied in denying that guilt:

> I made my own appraisal of him when he testified. I think he was a constant liar. He had a gun, and he pointed it.
>
> (24).
>
> * * *
>
> Now, when he took the witness stand and he started to testify, he wanted to make sure that the jury understood that it was intent to rob a bank. He wanted to make sure that they knew it was intent to rob

a bank. Intent to rob a bank is a lesser crime.

(24-25).

* * *

Now, when he got on the witness stand he contrived to think of every way he could to offer testimony concerning intent. Everything was intent, everything else was considered very carefully and very carefully planned. Every chance he got he tried to show intent.

(25).

* * *

But when he took the stand he recognized he was committing perjury. And he knew it. He avoided carefully admitting attempted robbery in the bank. And he did anything to cover that up.... What he said was that he intended to do that. He was attempting to rob the bank.

(26).

The point is, I don't believe his testimony.

(27).

Despite the fact that the jury at Herndon's mistrial had been unable to reach a verdict on the charge of attempted robbery by intimidation,* the judge insisted that:

> They [the jurors] realized that [Herndon] lied. He constantly lied while he was on the witness stand.
>
> (28).

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*Defense counsel indicated that the hung jury had been eleven to one for acquittal, and the Assistant U.S. Attorney even conceded that "maybe seven of [the jurors] didn't like the looks of the prosecution" (23-24).

When, just prior to the imposition of sentence, defense counsel again urged that the defendant be sentenced for only the lesser crime to which he had pleaded guilty -- entering the bank with intent to rob it -- the district judge stated that he would "assume" that Mr. Herndon "put people in fear of their lives" (30), thus demonstrating that the sentence soon to be imposed was premised on the judge's assumption that Herndon was guilty of attempted robbery with the use of force and intimidation, the charge on which the jury had been unable to reach a verdict.

Moreover, although the district judge stated at one point that he was not increasing the sentence imposed upon Herndon because Herndon had perjured himself (27), the judge thereafter made repeated references to his belief that Herndon had lied in his trial testimony (28), and then stated:

> In light of his background, and the fact that he testified, and took the stand, and avoided any evidence to the point that he attempted to rob the bank --
>
> (29).

At this point the judge was interrupted by a brief colloquy with defense counsel, after which he went on to impose sentence on Herndon (30).

Defense counsel also pointed out several other errors in the presentence report. Thus, the report stated that Herndon was currently using approximately $35 worth of cocaine per week. Herndon denied this, insisting that he had not used

any drugs since his arrest (15). His counsel pointed to the fact that, as the presentence report confirmed, urine tests conducted by the State Narcotics Addiction Control Commission showed no trace of cocaine or any other drug in Herndon's urine (11). Sachs stated that he had been informed by Herndon's narcotics commission parole supervisor that Herndon "admitted to having sporadically taken cocaine" (15). This Sachs translated into a statement that Herndon "has a weekly habit of approximately $35 per week" (15). When the court suggested bringing in the narcotics commission parole supervisor, Herndon declined, saying that he wanted to be sentenced and that he had told Mr. Sachs that he used cocaine only before his arrest (16).

Defense counsel also pointed out that the presentence report stated that Herndon had only one employment which the probation office had been able to verify (18). Defense counsel stated that, to the contrary, Mr. Herndon had "a good work record" of verifiable employments, giving the court the telephone number for one such verification (18). The judge said he would "assume that [Mr. Sachs] had been neglectful" (19).

Defense counsel also stated that the presentence report improperly characterized Mr. Herndon's family background and environment. The report, for example, improperly indicated that Mr. Herndon's mother, who counsel stated had been dead for two years, was a prostitute (8), and that his brother-in-law was Dan Connor, an individual with a criminal record

known to the court. In fact, Herndon's brother-in-law is Robert Connor, an individual with no criminal record (11). The court stated that such statements in the presentence report might be inaccurate (10, 11). Although indicating at one point that such inaccuracies were irrelevant (9), the court also stated that an understanding of Mr. Herndon's environment "would help me to understand his present situation" (10) and might affect his sentence (10).

Concerning the report in general, defense counsel said at various points during the sentencing procedure that

> [t]he inaccuracies are such that upon picking up this report it presents a picture of this man that in no way resembles Mr. Herndon.
>
> (6; see also 11, 14, 19, 20, 21).

Defense counsel argued that such errors demonstrated the bias and improper "attitude" of the report (see, e.g., 13). This resulted in incorrect subjective conclusions in the report concerning the defendant (see, e.g., 20) which might adversely affect the report's recommendation, and the judge's determination, of sentence.

After the discussion of these errors, the district judge sentenced Herndon to five years' incarceration under 18 U.S.C. §4208(a)(2), saying that the "other judges on the [sentencing] panel agreed" (31).

ARGUMENT

THE MATERIAL ERRORS IN THE PRE-SENTENCE REPORT AND THE IMPROPER GROUNDS UPON WHICH THE DISTRICT JUDGE IMPOSED SENTENCE REQUIRE A REMAND FOR RE-SENTENCING.

A. The district judge erred in sentencing appellant on the basis of the judge's belief that Herndon had committed an attempted robbery by intimidation.

Appellant Herndon was originally indicted for one count of attempted bank robbery by intimidation. At the trial on that charge, the bank guard testified that Mr. Herndon had entered the bank and drawn a gun on the guard, threatening to shoot him if he didn't turn over the money. A toy gun was found in Herndon's pocket at the time of his arrest. Herndon testified on his own behalf. He admitted the lesser crime of entering the bank with intent to rob it, but denied having drawn a gun or in any way intimidating the guard. A mistrial was declared when the jurors were unable to reach a verdict.

Herndon thereafter pleaded guilty to one count of a superseding indictment -- the count charging him with entering the bank with intent to rob it.

At the sentencing on that charge, the district judge repeatedly stated that he believed Herndon had lied in in-

sisting that he had not pulled a gun or used intimidation (8, 24, 25, 26, 27). The judge further stated that the jury had known that Herndon was lying (28), that Herndon had in fact "had a gun and pointed it" (25), and that the judge would assume that Herndon had "put people in fear of their lives" (30). The imposition of sentence on the basis of these assumptions was error.

It is clearly established that a sentence based on erroneous information must be set aside. Townsend v. Burke, 334 U.S. 736 (1948); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970); see also United States v. Tucker, 404 U.S. 736 (1972); United States v. Brown, 479 F.2d 1170, 1173 (2d Cir. 1973); United States v. Needles, 472 F.2d 652, 657 (2d Cir. 1973); McGee v. United States, 462 F.2d 243 (2d Cir. 1972). The court's statement at the sentencing in this proceeding that "the [the jurors] realized that [Herndon] had lied" was such an error. There was no verdict of guilty or any other indication in the record of the proceedings that the jurors disbelieved Herndon's testimony. To the contrary, the jurors were unable to reach any verdict. Defense counsel stated that the jury was eleven to one for acquittal, and even the prosecutor conceded that "maybe seven of [the jurors] didn't like the looks of the prosecution." The principal issue for the jury was whether to believe the bank guard, whose testimony established a prima facie case of attempted robbery through intimidation, or the defendant, who admitted only the

lesser crime of entering the bank with intent to rob it and denied any use of intimidation. Consequently, the jurors' inability to reach a verdict indicates that at least some of the jurors credited the defendant's testimony. At the very least the mistrial provides no basis whatsoever for the judge's assumption that the jurors "knew" the defendant had lied.

Similarly, it was improper for the district judge to sentence appellant on the basis of the judge's own belief Herndon had lied, that he had "had a gun and pointed it," and that he had "put people in fear of their lives." United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974). In Hendrix, this Court held as to the sentencing judge's consideration of a defendant's suspected perjury at trial:

> ... [W]e hold today that in the future perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it.
>
> Id., 505 F.2d at 1236.

Appellant submits that under Hendrix and basic due process considerations, the district judge should not have considered either his belief in Herndon's perjury at trial or his belief that Herndon had "pointed" a gun and "put people in fear of their lives" without first expressly determining beyond a reasonable doubt that such assumptions were valid.

Considering first the suspicion of perjury, although the district judge stated that he would not consider that factor

in sentencing, the transcript of the proceedings strongly indicates the contrary. The judge stated no less than ten times in the thirty-page transcript of the sentencing proceeding his belief that Herndon had lied. Several of these instances occurred after the judge had stated that he would not consider the suspected perjury. Moreover, immediately prior to imposing sentence, the district judge started to say:

> In light of his background, and the fact that he testified, and took the stand, and avoided any evidence to the point that he attempted to rob the bank --
>
> (29).

After a brief interruption for a colloquy with defense counsel, the judge went on to impose sentence. It is respectfully submitted that these repeated references to the defendant's suspected perjury, particularly just before imposition of sentence, indicate that the suspicion affected the sentence imposed.

Even if the district judge did not consider his suspicion of Herndon's perjury in sentencing per se, he explicitly considered his belief that Herndon had pointed a gun and "put people in fear of their lives. Thus, repeatedly throughout the sentencing proceeding, the judge stated his belief that although Herndon had pleaded guilty only to entering a bank with intent to rob it, he was in fact guilty of attempted robbery through intimidation. Moreover, immediately prior

to the imposition of sentence, when defense counsel urged that Mr. Herndon should be sentenced only for the crime of entering the bank with intent to rob rather than the more serious crime of attempted robbery with intimidation, the judge stated that he would "assume" that Herndon had "put people in fear of their lives." Since such use of intimidation was the only element distinguishing the crime to which appellant had pleaded guilty from the charge of attempted robbery with intimidation, this amounted to an assumption of Herndon's guilt on the more serious crime. It also assumed his perjury at trial in denying such guilt.

Appellant Herndon submits that a sentence imposed on the basis of a mere suspicion that the defendant has committed a more serious crime violates the Fifth Amendment's protection against deprivation of liberty without due process and the principles of fundamental fairness inherent in the judicial process. Where, as here, there has been no jury determination of appellant's guilt of the more serious crime and the defendant disputes that guilt, the sentencing judge violates these protections by assuming such guilt without at least making an express* determination of such guilt beyond a reasonable doubt. United States v. Hendrix, supra, 505 F.2d 1233. This case, lacking such a determination, should be remanded for re-sentencing.

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*Dorsynski v. United States, 414 U.S. 424 (1974).

B. The errors in the presentence report require that this case be remanded for re-sentencing on the basis of an accurate and balanced report.

Defense counsel called the sentencing court's attention to numerous material errors in the presentence report. Thus, she pointed out that the report claimed that Herndon had admitted to attempted robbery, whereas he had consistently admitted only to entering the bank with intent to rob it, a less serious crime. The report also claimed that Herndon currently had a $35 a week cocaine addiction, whereas he insisted he had taken no drugs since his arrest. The report claimed that Herndon had only one verifiable prior employment, whereas defense counsel insisted that he had a good employment record and provided the court with a telephone number through which to verify another of appellant's prior jobs. The report also claimed that appellant's brother-in-law was a criminal with a record known to the sentencing judge, whereas in fact appellant's brother-in-law is a different individual altogether with no criminal record. Finally, the report suggested that appellant's mother was a prostitute, whereas appellant insisted that this was not true.

The probation officer and/or the court conceded the possibility of certain inaccuracies in the report, the judge at one point stating that he would assume the probation officer

who prepared the report had been neglectful. Other claims of error were disputed and left unresolved. Defense counsel argued that such errors were not only prejudicial in and of themselves, but also adversely affected the report's subjective evaluation of the defendant, producing "a picture of this man that in no way resembles Mr. Herndon."

In United States v. Malcolm, supra, 432 F.2d at 819, this Court held that a criminal sentence should be imposed with "insight and understanding" based on correct and complete information. The importance of the presentence report in providing such information is generally assumed. United States v. Malcolm, supra, 432 F.2d at 817-818; see also United States v. Roman, Doc. No. 73-1511, slip opinion 5341 (2d Cir., September 26, 1973); United States v. Manuella, 478 F.2d 442, n.3 (2d Cir. 1973); United States v. Warren, 453 F.2d 738, 743-744 (2d Cir.), cert. denied, 406 U.S. 944 (1972); Eddy, The Investigation for the Court, 4 Fed.Prob. 26 (August-October 1940);* Meeker, Analysis of a Presentence

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* The findings of the presentence investigation are indispensible to the judge who wishes to base his decision concerning an offender upon a broader foundation than mere familiarity with the details and circumstances of the offense and its legal implications. This fact ... is ... readily apparent and ... generally accepted....

Report, 14 Fed.Prob. (March 1950);* Kennedy, The Presentence Investigation Report Is Indispensible to the Court, 5 Fed. Prob. 3 (April-June 1941); Duffy, The Value of Presentence Investigation Reports to the Court, 5 Fed.Prob. 3 (July-September 1941); Schwellenback, Information and Intuition in the Imposition of Sentence, 7 Fed.Prob. 3 (January-March 1943); Dawkins, Probation or Prison? Youth or Adult?, 30 F.R.D. 276, 278 (1961). Given the report's significance, fundamental justice and due process require that it be accurate, United States v. Malcolm, supra,** neutral, United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973),*** and complete, Rule 32(c)(2), Fed.R.Crim.P.****

Where, as here, the presentence report contains numer-

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* The primary function of a presentence report is to present the Court with a concise, yet adequate, evaluation of all the factors which will influence the adjustment of an offender, either on probation or in confinement.

**See also Townsend v. Burke, supra; United States v. Tucker, supra; United States v. Needles, supra; McGee v. United States, supra.

***See also Dates, When Is Probation Not Probation?, 24 Fed.Prob. 13, 16 (December 1960); Evjen, Some Guidelines in Preparing Presentence Reports, 37 F.R.D. 177, 179 (1964).

****See also Kennedy, The Presentence Report Is Indispensible to the Court, supra, 5 Fed.Prob. 3; Duffy, The Value of Presentence Investigation Reports to the Court, 5 Fed. Prob. 3 (July-September 1941); McGuire and Moltzoff, The Problem of Sentence in the Criminal Law, Fed.Prob. 20; Russell, What the Court Expects of the Probation Officer, 10 Fed.Prob. 6, 8 (July-September 1946); Wallace, Aids in Sentencing, 40 F.R.D. 433, 437 (1965); Evjen, Some Guidelines in Preparing Presentence Reports, 37 F.R.D. at 179-180.

ous material errors or omissions, some even conceded by the probation officer at sentencing, those errors will have an inevitable adverse effect on the report's subjective analysis of the defendant and the report's recommendation as to sentence. Moreover, in the Eastern District, the report, so written, will have an unjust negative impact on the consideration and recommendation of sentence by the sentencing panel, a recommendation which the sentencing judge expressly relied on in the present proceeding.

The fact that defense counsel called these errors to the district judge's attention at sentencing does not remedy the prejudice. Certain claims of error were not accepted by the court, and even as to those errors which were conceded at sentencing, the defendant should be entitled to benefit from the impact of those corrections on a revised subjective evaluation in the presentence report, a revised recommendation as to sentence by the probation department, and a renewed consideration of that report by the sentencing panel.

Appellant Herndon submits that where, as here, defense counsel raised numerous claims of material error in the presentence report, the defendant is entitled to have the district court order a new presentence report correcting the errors which are conceded and investigating further or substantiating the claims of error which are not conceded.*

*If, after such further investigation, disputes as to material facts persist, the district court may find it necessary itself to conduct a hearing to determine the accuracy of the probation department's findings.

Given the numerous errors in the presentence report in this case, appellant Herndon's sentence should be set aside and the case remanded with instructions that such a procedure as recommended herein be followed.

CONCLUSION

For the foregoing reasons, this case should be remanded to the district court for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

July 30, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.